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UNITED ASIAN BANK BHD.

v.

BALAKRISHNAN THANAKODI & ORS.

HIGH COURT MALAYA, KUALA LUMPUR

VC GEORGE J

b

[CIVIL SUIT NO. C 679 OF 1984]

25 APRIL 1991

c

CIVIL PROCEDURE: *Discontinuance of an action - Default judgment - Set aside with liberty to file afresh - Validity of carbon copy of notice of demand - Whether proper demand - Whether existing cause of action - Limitation - Discretion of Court - Cause of delay - Rules of the High Court 1980, O. 21 rr. 2(1), 3(1).*

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In 1980, the second to fifth defendants guaranteed certain amount that were advanced by the plaintiffs to the first defendant, D1. As a result of non-payment of the amount claimed by the plaintiffs, judgment in default was entered against the second and third defendants, D2 and D3 on 9 May 1984. As a result of bankruptcy notice issued against him, D3 took out an application to set aside the default judgment, which was allowed by the Senior Assistant Registrar (SAR) on 5 March 1990.

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On 6 March 1990, the plaintiff appealed against the SAR's order; D3 entered an appearance on 14 March 1990 and filed and served his statement of defence. The matter was then adjourned *sine die*. On 17 January 1991, the plaintiffs obtained a discontinuance of the action against D3 with liberty to file afresh. This is D3's appeal against the SAR's decision granting the plaintiffs liberty to file afresh.

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Held:

[1] The plaintiffs would have failed in their action against D3 because when the writ was issued, there was no cause of action against D3 because there had not been a proper demand made on him. Therefore, D3 was able to satisfy the Court that he had a defence on the merits. Time had therefore not begun to run against D3, as stated in O. 21 r. 2(1) of the RHC 1980 and therefore the submission that D3 that the action was barred by limitation has no merit.

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[2] In exercising the powers in respect of terms to be imposed in discontinuing an action given by O. 21 r. 3(1), the Court is entitled to refuse leave to file afresh whether or not limitation has set in. The discretion given to the Court is wide.

[3] The substantial cause for the long delay which D3 complains about is due to D3 allowing the default judgment to be entered and not doing anything about it until 5 years had passed. Therefore, it cannot be said that the SAR had exercised her discretion wrongly.

[Appeal dismissed with costs.]

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Cases referred to:

Orang Kaya v. Kwong Yik Bank Bhd. [1989] 2 MLJ 155 (**cons**)

Hess v. Labouchere 14 TLR 350 (**fol**)

Robertson v. Purley [1906] 2 Ch 615 (**cit**)

Fox v. Star Newspaper Co. [1898] 1 QB 636 (**fol**)

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Legislation referred to:

Rules of the High Court 1980, O. 21 rr. 2(1), 3(1)

Patents, Design and Trade Marks Act 1883 [UK], s. 19

For the plaintiffs - M. Sinniah; M/s. K.L.Rekhraj

For the 3rd defendant - R. Devadason; M/s. Devadason & Devadason

JUDGMENT

VC George J:

The writ herein with statement of claim was caused to be issued on 15 March 1984. The claim was in respect of amounts outstanding on advances to the 1st defendant guaranteed by the other defendants. Judgment in default of appearance was entered against the 3rd defendant guarantor (and the 2nd defendant) on 9 May 1984 for RM33,996.62 with interest thereon at 8.5% p.a. on monthly rests from 1 February 1984, until realisation and for the further amount of RM6,738.82 with interest thereon at 14.75% p.a. on daily rests from 1 February 1984, until realisation. The 3rd defendant was notified of the terms of the default judgment and a demand was made for payment of the judgment sum. He had apparently ignored the service of the writ and statement of claim and he had ignored this demand as well.

On 19 December 1989, the 3rd defendant, reacting to a bankruptcy notice that the plaintiffs had served on him, took out his application to set aside the default judgment. This was opposed. The learned SAR allowed the application. The 3rd defendant had explained that he had been told by the borrower 1st defendant that he would settle his debt which is why the 3rd defendant had not done anything about the judgment. This explanation apparently was accepted by the SAR. The 3rd defendant had also managed to satisfy the SAR that he had a defence on the merits. The default judgment was set aside on 5 March 1990 and on or about 14 March 1990, the 3rd defendant entered an appearance and filed and served his statement of defence.

Meanwhile on 6 March 1990, the plaintiff had filed notice of appeal against the Senior Assistant Registrar's order setting aside the default judgment. A few days before that, on 1 March 1990, the plaintiff had also filed an application to have the default judgment amended to put right the order in the judgment in respect of interests payable after the date of judgment in respect of which the plaintiffs had obtained more than the 8% p.a. that they at that time statutorily entitled. That summons became of academic interest because of the order of the SAR setting aside the default judgment. The plaintiffs did not proceed with it as against the 3rd defendant.

The appeal came up for disposal before me on 11 June 1990, when it was adjourned *sine die*. The relevant notes of proceedings show that when the appeal was called Counsel for the plaintiffs informed the Court that the plaintiffs proposed withdrawing the action in doing which they would seek liberty to file afresh. He asked for the appeal to be, in the meantime, adjourned *sine die* and it was so adjourned on 11 June 1990.

However, nothing more was done until 9 December 1990, well before which date the pleadings in respect of the matter was deemed to have been closed *vis a vis* the 3rd defendant in that, as has been seen, he had filed and served the statement of defence on or about 14 March 1990. On 19 December 1990, the plaintiffs filed their application for leave to discontinue the action as against the 3rd defendant with liberty to file afresh. This was heard on 17 January 1991, when the learned SAR gave the plaintiffs an order in terms of the application.

The matter before me is the 3rd defendant's appeal against the decision of the SAR granting the plaintiffs liberty to file afresh.

- a** Order 21 r. 2(1) provides that a plaintiff in an action begun by writ may without leave discontinue the action not later than 14 days after service of the defence. Order 21 r. 3(1) in effect provides that once the 14 days after service of the defence has passed discontinuance may be only with leave, in granting which the Court is empowered to impose terms as it thinks just *inter alia* in respect of costs and in respect of the bringing of a subsequent action.
- b** The plaintiffs give as their reason for wanting to discontinue, the decision of the Supreme Court in *Orang Kaya v. Kwong Yik Bank Bhd.* [1989] 2 MLJ 155 which was to the effect that simply sending a carbon copy to the guarantor of a letter of demand on the principal borrower does not amount to a demand on the guarantor. In the instant case apparently the purported demand on the 3rd defendant guarantor (which was a condition precedent to a cause of action arising against him) was a somewhat similar carbon copy. The plaintiffs
- c** apparently think that in face of the said Supreme Court decision, they would be bound to fail in the instant case as against the 3rd defendant in that when the writ was caused to be issued in fact there was no cause of action as against the 3rd defendant guarantor because there had not been a proper demand made on him. Counsel for the plaintiffs pointed out that it was on that basis that the 3rd defendant was able to satisfy the Court that he had a defence on the merits. It follows, it was argued that contrary to the submission of the 3rd defendant's Counsel, time had not begun to run against the 3rd defendant. I agree with that submission. I also agree that accordingly the submission by Counsel for the 3rd defendant that the action is barred by limitation has no merit. However in exercising the powers in respect of terms to be imposed in discontinuing an action given by O. 21 r. 3(1) the Court is entitled to refuse leave to file afresh whether or not limitation has set in. The discretion given to the Court is wide. The Court will consider all the circumstances and if it seems just,
- d** can and will impose a term that no other action shall be brought - *Hess v. Labouchere* 14 TLR 350.
- In *Robertson v. Purley* [1906] 2 Ch 615 which was an action for infringement of a patent the plaintiff shortly before trial discovered that his specification needed correction and that without which correction he would not succeed in the action. He applied for leave to discontinue with liberty to file afresh. It was held that on the peculiar facts of the case leave should only be given on terms of the plaintiff not bringing any action in respect of the infringement alleged in the present action. The Judge, Buckley J, pointed out that because of the terms of s. 19 of the Patents, Design and Trade Marks Act 1883, he was obliged to impose the terms as otherwise the Court will in effect enable the plaintiff to get round the statutory impediment imposed by the said s. 19.
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- g** In the English Court of Appeal in *Fox v. Star Newspaper Company* [1898] 1 QB @ 639 Chitty LJ referred to the principle behind the rule:
- The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into Court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the Judge to say ... whether the action shall be discontinued or not and upon what terms ... The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the Judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter.
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In the instant case, before the SAR it would seem from her notes of proceedings that the attempt to obtain leave to file afresh was opposed substantially on the contention that limitation had set in. As has been seen, if in fact there was no cause of action as against the guarantor, then time had not begun to run against him and accordingly the limitation argument is without merit which no doubt substantially influenced the learned Senior Assistant Registrar's decision to give the plaintiff leave to file afresh.

The 3rd defendant had provided his guarantee on 13 May 1980 . The writ was caused to be issued on 13 March 1984. Judgment was entered against the 3rd defendant on 9 May 1984. It was a regular judgment. He did nothing about it until he filed his application to set aside on 19 December 1989. He stated in the summons he was entitled *ex debito justitiae* to the order. He succeeded in having the default judgment set aside but not *ex debito justitiae*. It was set aside on 5 March 1990, because the Court in its discretion accepted his explanation for allowing default judgment to be entered and his explanation for not doing anything about it for over 5 years and also found that he had a defence on the merits.

Before me it was *inter alia* pointed out that 11 long years had passed since the guarantee was provided and to allow the bank to now start afresh against the 3rd defendant would be an injustice. However on the facts all that the 3rd defendant can complain *vis-a-vis* the delay is the period from the 14th day after he delivered his defence on 14 March 1990, until the application to discontinue was filed which was on 19 December 1990, that is some 9 months. It is the 3rd defendant allowing the default judgment to be entered and not doing anything about it until 5 years had passed that is the substantial cause for the long delay that he complains about. Accordingly it is not at all possible to say that the learned SAR, in dealing with the application encl. (36) in the Court's file, had exercised her discretion on some wrong principle or that for some other reason the appeal should be allowed.

The appeal has to be and is dismissed with costs.

Also found at [1992] 1 CLJ 522

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